Supreme Court, U.S.
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No. 98-174

In The

Supreme Court of the United States

October Term, 1997

DAVID W. SILVERMAN, as Independent Fiduciary of The Unitron Graphics, Inc. Profit Sharing Trust and Unitron Graphics, Inc. Profit Sharing Trust-Union and Non-Union Division,

Petitioner,

vs.

MUTUAL BENEFIT LIFE INSURANCE COMPANY, PRINCIPAL MUTUAL LIFE INSURANCE COMPANY and HELENE GORNY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MUTUAL BENEFIT LIFE INSURANCE COMPANY AND HELENE GORNY

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QUESTION PRESENTED

1. Did the Second Circuit err in concluding that Respondents Mutual Benefit Life Insurance Company ("Mutual Benefit"), and one of its employees, Helene Gorny ("Gorny"), had not breached their ERISA fiduciary duties in complying with a facially valid notice from a trustee of an employee profit sharing plan discontinuing the investment contract and directing the transfer of funds to the trustees.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

There or no publicly-owned parent or subsidiary company of respondent Mutual Benefit Life Insurance Company.

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STATEMENT OF THE CASE

A. Nature of Case and Course of Proceedings

This petition seeks this Court's review of the Second Circuit's well-reasoned opinion affirming the District Court's grant of summary judgment to Mutual Benefit and Gorny and to Principal Mutual Life Insurance Company ("Principal") (Pet. pp. 1a-20a).[1] Petitioner thereafter sought rehearing and *en banc* consideration. The Second Circuit denied the motion in all respects. (Pet. pp. 72a-73a). Petitioner now seeks a Writ of Certiorari from this Court.

Following the issuance of the District Court's decisions, the United States Department of Labor obtained leave to file an amicus brief in support of the appeal against Principal. The Department of Labor apparently found nothing objectionable with the District Court's holding concerning Mutual Benefit and Gorny and its *amicus* brief to the Second Circuit did not address any issues regarding them.

B. Statement of Facts

The decisions below turned on their own peculiar facts and, as such, will not affect anyone other than the litigants. The unique and undisputed facts were set forth in the Second Circuit decision:

> In 1988, Unitron Graphics, Inc. ("Unitron") established the plan [the Unitron Graphics, Inc. Profit Sharing Trust and the Unitron Graphics, Inc.

1. Principal succeeded Mutual Benefit as the investment manager of certain of Petitioner's profit sharing plan investments. This brief is submitted only behalf of Mutual Benefit and Gorny and is addressed to the arguments made at pages 5-10, 15-21 of the Petition.

Profit Sharing Trust-Union and Non-Union Division (the "Plan")] for employee profit-sharing.[2] It was established as an "individual account" or "defined contribution" ERISA plan under 29 U.S.C. § 1002 (34). Each participating employee could elect to have Unitron set aside part of his salary as a contribution to the plan; in addition, [Unitron] could make matching and discretionary contributions.

The plan had two named trustees: Jacob Zucker and Aaron Fertig, who are owners and officers of Unitron. The plan provided that joint trustees "shall act by a majority of their number but may authorize one or more of them to sign all papers on their behalf." It further provided that Mutual Benefit "may rely on the signature of any Trustee on . . . any document used in connection with" a plan-related contract.

The plan's assets were invested pursuant to a group annuity contract between the Trustees and Mutual Benefit. The Trustees retained the right to cancel the contract at any time.

Mutual Benefit experienced well-publicized financial problems in the Spring and Summer of 1991, which culminated in a July 16th, 1991 order of the Superior Court of New Jersey placing Mutual Benefit into court-supervised rehabilitation.

On July 1, 1991, Zucker wrote to Mutual Benefit to cancel the contract. The letter was on Unitron

2. Mutual Benefit and Gorny were not signatories to the 401(k) Plan, nor were either identified as a Trustee, Plan Administrator or a "named fiduciary" in the Plan (*see* App. p. 149 defining "Trustee" and "Plan Administrator" and App. p. 164 naming "Fiduciaries").

stationary and was signed by Zucker as trustee. The letter requested that Mutual Benefit return the plan funds to Unitron, along with an accounting breakdown for each plan participant. Mutual Benefit did not send the funds to Unitron, apparently because the funds could not properly be paid to the company but only to the trustees in their fiduciary capacity.

On August 15, 1991, Zucker, as plan trustee, wrote a second letter to Mutual Benefit. This letter instructed that the assets of the plan be remitted to the Unitron Graphics, Inc. profit sharing trust with a breakdown by participant.

Accordingly, Mutual Benefit liquidated the fund's investments and defendant Gorny, a Mutual Benefit customer service supervisor, approved a check requisition.[3] On August 30, 1991, Mutual Benefit sent Zucker a check for the proceeds in the amount of $239,811.28 payable to the plan.

Zucker deposited the check in the plan's bank account on September 6, 1991. Over the next few weeks, Zucker and Fertig embezzled $130,000 from the account.[4]

(Pet. pp. 4a-6a).

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3. Gorny's written approval of the check requisition, which requisition had been prepared by a Mutual Benefit service representative, constituted the extent of Gorny's involvement in the events that underlie this action. (App. 233, 235-36).

4. Zucker and Fertig pled guilty to embezzlement including monies belonging to the 401(k) Plan. Judge Glasser sentenced them and also removed them as Trustees of the 401(k) Plan and appointed Petitioner as the independent fiduciary of the Plan, succeeding to Zucker's and Fertig's role (App. 85-89).

REASONS FOR DENYING THE WRIT

I.

THE COURTS BELOW CORRECTLY FOUND THAT MUTUAL BENEFIT AND GORNY DID NOT BREACH THEIR FIDUCIARY DUTIES OR CONTRACTUAL DUTIES IN COMPLYING WITH A WRITTEN DIRECTION FROM A TRUSTEE OF THE 401(k) PLAN TO DISCONTINUE THE INVESTMENT CONTRACT AND TRANSMIT THE FUNDS TO THE 401(k) PLAN.

Petitioner reasserts the same arguments to this Court as he made to the underlying federal courts, namely that Mutual Benefit and Gorny breached their fiduciary duties by not inquiring "as to why a single trustee [Zucker] . . . had issued a direction to transfer certain pension accounts." (Pet. p. 20). The courts below conducted extensive analyses of the record and determined that no breach had occurred. Those decisions are correct applications of the settled law, based on unique circumstances that are not likely to present themselves again, and, consequently, do not warrant review by this Court.

The District Court expressly held that

> [u]nder the terms of the Contract . . . , once the trustees [Zucker and Fertig] made a request for the release of the Plan's funds, Mutual Benefit [and Gorny] had no authority to refuse it.

(Pet. 30a). The District Court also rejected petitioner's argument that:

> [B]ecause the [July 1, 1991 and August 15, 1991] letters were signed by only one trustee, Zucker,

Mutual Benefit and Gorny should have suspected that something was amiss, [noting]:

> Even leaving aside the fact that the co-trustee, Fertig, was also involved in the subsequent embezzlement, this argument is unpersuasive. As Mutual Benefit and Gorny note, the written agreement establishing the Plan specifically provided that "[t]he Insurer [Mutual Benefit] may rely on the signature of any Trustee on an application for or any document used in connection with a Contract or Policy." (Pet. p. 32a quoting App. p. 165), [and that,] [a]s fiduciaries, Mutual Benefit and Gorny were required to discharge their duties in accordance with the written terms of the Plan. 29 U.S.C. § 1104(a)(1)(d).

Pet. p. 32a.[5]

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5. The District Court also stressed that the Contract between the trustees and Mutual Benefit provided that:

> We [Mutual Benefit] are entitled to assume that the Plan permits any action taken by you [the trustees]. We are not a party to the Plan, and are not responsible for its validity. Except as expressly provided in this contract or any other written agreement accepting responsibility, we are not responsible for any duties under the Plan or for any duties of the Plan administrator or named fiduciary.
>
> We may rely on any action taken by you under this contract, and will be held harmless and completely discharged when acting on your direction or authorization.

App. p. 126, "Exoneration".

Similarly, the Second Circuit ruled that:

> Mutual Benefit's transfer of Plan funds to Zucker, in the form of a check made out to the Plan, complied fully with the terms of Mutual Benefit's contract with the plan . . . Upon written notice of discontinuance, Mutual Benefit was required to return to the Plan all "Investment Accounts held under this contract."
>
> The transfer of plan funds also complied fully with the terms of the plan itself. . . . Under the terms of the plan, the joint trustees "may authorize one or more of them to sign all papers on their behalf." The plan further provided that Mutual Benefit "may rely on the signature of any Trustee on any application for or any document used in connection with" its contract with the plan. The plan delegated to Zucker the authority to act on behalf of both trustees in documents used in connection with the plan, and Mutual Benefit lawfully relied on this authority in connection with cancellation of the contract.
>
> * * *
>
> Mutual Benefit had no duty of inquiry pursuant to § 1104(a)(1)(B) prior to releasing plan funds to Zucker. It had no reason to be suspicious of Zucker's cancellation of the contract . . . Mutual Benefit's financial problem in the Spring and Summer of 1991 provided ample reason for the cancellation. Zucker's cancellation request complied fully with the terms of all relevant plan documents and the contract itself . . . Summary

judgment was properly granted in favor of Mutual Benefit and Gorny.

Pet. pp. 10a-11a.

As held, Mutual Benefit was contractually bound to respond to the written direction of the Trustee and its conduct in doing so was, in all respects, proper. Moreover, Mutual Benefit is not clairvoyant and had no means to discern the intentions of Zucker an Fertig to embezzle the funds, if indeed that was their intention in July-August, 1991. Indeed, petitioner's argument is totally unworkable as it would require every fiduciary to inquire as to the trustee's motive before obeying any basically valid contractual directive. No financial institution would serve under such a rule.

Petitioner cites a few cases for general propositions that have no bearing on the case at bar. *Matthews v. Sears Pension Plan*, 144 F.3d 1041 (7th Cir. 1998), for example, is cited for the Court's discussion of contract interpretation in ERISA matters. Petitioner here does not identify any particular contractual term that petitioner contends was misinterpreted.

Petitioner also cites a series of cases for the general proposition that "[a] fiduciary's obligation to a participant is only extinguished when adequate provisions have been made for the continued prudent management of plan assets." Pet. p. 19.[6] Here, whatever fiduciary duty Mutual Benefit and Gorny had with respect to the Plan funds was extinguished when the funds were transferred at the written request of the Trustees

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6. *Chambers v. Kaleidoscope, Inc. Profit Sharing Plan*, 650 F. Supp. 359, 369 (N.D. 1986); *Pensions Benefit Guaranty Corp. v. Greene*, 520 F. Supp. 1483 (W.D. Pa. 1983), *aff'd mem.*, 727 F.2d 1100 (3d Cir.) *cert. den.*, 469 U.S. 820, 105 S. Ct. 92, 83 L. Ed. 2d 38 (1984); and *Freund v. Marshall & Isley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979).

and deposited in the Plan's bank account. The actual loss sustained by the 401(k) Plan was not caused by the transferring of the funds to the Plan's bank account; the loss resulted weeks thereafter from the superseding criminal conduct of Zucker and Fertig in embezzling $130,000 of those monies.[7]

Petitioner's reliance on *Firstier Bank, N.A. v. Zeller*, 16 F.3d 907, 910-11 (8th Cir. 1994) is misplaced since there, under strikingly similar circumstances, the Eighth Circuit held that

> [b]ecause Firstier obeyed the Plan and the statute, the participants may not shift to Firstier responsibility for their own subsequent loss of the proceeds or for the unknown misdeeds of another fiduciary, Dombroski. Thus, on the specific facts of this case . . . Firstier had no duty to inquire.

16 F.3d at 913.

II.

THE SECOND CIRCUIT IMPLICITLY REJECTED PETITIONER'S ARGUMENT THAT MUTUAL BENEFIT AND GORNY HAD AN OBLIGATION TO OBTAIN THE APPROVAL OF THE PLAN PARTICIPANTS BEFORE COMPLYING WITH THE WRITTEN DIRECTION OF A TRUSTEE.

Petitioner erroneously argues that the Second Circuit "ignored" his argument that Mutual Benefit "allowed an unauthorized party [the Trustees, Zucker and Fertig] to make

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7. *See Whitfield v. Lindemann*, 853 F.2d 1298, 1304 (5th Cir. 1988), *cert. denied sub nom, Klepak v. Dole*, 490 U.S. 1089, 109 S. Ct. 2428 (1989); *Brandt v. Grounds*, 502 F. Supp. 598 (N.D. Ill, 1980), *aff'd*, 697 F.2d 895, 897 (7th Cir. 1982).

an investment decision *i.e.*, liquidate certain investment accounts and transfer the amount," claiming that the participants alone could make such so-called investment decisions. (Pet. p. 16). The Second Circuit did not "ignore" the argument, it impliedly rejected it or, alternatively, refused to consider it because petitioner had not raised it in the District Court (Pet. p. 12a). In any event, the argument is specious since the statutes on which petitioner relies, 29 U.S.C. § 1104(c) and 26 U.S.C. § 401(k)(10)(A)(i), simply provide that ERISA fiduciaries, in discharging their duties in the interests of participants and beneficiaries, must invest prudently and in accordance with the documents and instruments governing the plan. Nowhere do they provide that investment management decision-making rests with the participants.

It was the Trustees here, not the participants, who were authorized by the Plan documents to determine with whom to invest the 401(k) Plan contributions and the Trustees here chose to invest them in a funding vehicle provided by Mutual Benefit.[8] The participants were not empowered to invest their contributions in investment vehicles other than those offered by Mutual Benefit's or to terminate the Contract and invest all of the 401(k) Plan contributions elsewhere. The authority for making those decisions rested solely with the Trustees.[9]

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8. The participants' exercise of control was limited to "choos[ing] among the various Investment Accounts defined in the Contract . . . change their choices and transfer between Investment Accounts, as permitted in the Contract." (*See* App. p. 152, Article VI, "Investment of Contributions", para. 2). Plan participants (Unitron employees) could, for example, choose to invest their contributions in any one of four "separate" accounts (Equity Growth, Aggressive Equity, Short Term Money Market and Real Estate) in which the rate of return fluctuated according to a variety of economic and financial events affecting the accounts' investments. *See* App. pp. 109-17 for a description of the accounts.

9. The trustees of the 401(k) Plan were charged with the (Cont'd)

Nothing in the Plan documents compelled the Trustees to seek the permission of the participants prior to terminating the Contract. As for Mutual Benefit and Gorny, they had no input into the decision of the Trustees and had no contractual or statutory obligation to report the decision to the participants.

III.

NO GENUINE CONFLICT OF AUTHORITY EXISTS REGARDING THE DUTY OF INQUIRY ON THE PART OF MUTUAL BENEFIT AND GORNY.

Petitioner does not allege that there exists a conflict between the circuits on the law regarding the alleged duty of inquiry on the part of Mutual Benefit and Gorny, or regarding any other aspect of his claim against these Respondents. Moreover, petitioner does not allege, let alone demonstrate that any other Circuit would have held differently had it been presented with the unique facts at issue here. Indeed, the Eighth Circuit in *Firstier Bank N.A. v. Zeller*, 16 F.3d at 910-11, held, on analogous facts, precisely as the Second Circuit did here.

(Cont'd)
responsibility of choosing the appropriate investment vehicle for the participants funds. If they could not discontinue the Contract and move the funds elsewhere according to their best judgment, they could not effectively discharge this responsibility. Thus, if participants could individually elect to discontinue or not discontinue the Contract as to his or her accounts and enter into other contracts with different investment managers, the Plan would be unworkable.

CONCLUSION

For all the reasons set forth above, Respondents respectfully request that this court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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